

First-tier Tribunal for Scotland (Housing and Property Chamber)

Decision in respect of an application under Section 48 of the Housing (Scotland) Act 2014 (“the Act”) and issued under The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Rules of Procedure 2017

Reference number: FTS/HPC/LA/23/0371

Re: Property at 16-1/2 Bank Street, Aberdeen AB11 7SX (“the Property”)

The Parties:

XUSA Limited, having their registered office at Hollycroft House, Epsom KT17 1JR (“the Applicant”)

Stonehouse Property Lettings, Neo House, Riverside Drive, Aberdeen AB11 7DG (“the Respondent”)

Tribunal Members

James Bauld (Legal Member and Chair)

Elizabeth Dickson (Ordinary Member)

Background

1. This is an application which was originally lodged on 7 February 2023. It relates to allegations of breaches of The Letting Agent Code of Practice (“the code”) which was introduced by The Letting Agent Code of Practice (Scotland) Regulations 2016. The applicant claimed that 18 separate sections of the Code had been breached by the respondent.
2. A Case Management Discussion (CMD) took place on 19 July 2023 to consider this application. The CMD was conducted by telephone conference call.

The Case Management Discussion

3. The applicant was represented by their director, Mr Alex Impey. The respondent was represented by their Head of Property Management, Miss

Lisa Campbell, who was accompanied by Miss Kerri Haggerty, their Operations Manager.

4. At the conclusion of the CMD, the tribunal issued a Note setting out the issues which had been discussed and indicating that a hearing would be fixed to determine matters. The Note also encouraged parties to try to resolve the matter by negotiation.

The hearing

5. The applicant was represented by their director, Mr Alex Impey. The respondent was represented by their Senior Portfolio Manager, Ms Leah Low.
6. The tribunal members asked various questions of the representatives relating to the application.
7. It had been accepted by the respondent at the CMD that they are registered as a letting agent and that they are subject to the Letting Agent Code of Practice. The representatives on that date acknowledged that they were aware of the terms of the code and the duties imposed upon letting agents by the code.
8. In the application, the applicant alleged various breaches of the code and sought compensation in respect of losses which they say arose directly from the agents breaches of the code.
9. The tribunal reminded parties at the start of the hearing that parties had been encouraged to try to resolve the matter informally prior to the hearing. Some initial discussion in that regard had taken place at the CMD. The tribunal had also requested that the applicant lodged additional evidence from the contractor who had carried out the works.
10. The tribunal indicated to the parties that it had received no further communication from either party advising of any steps which had taken place.
11. Mr Impey on behalf of the applicant indicated that he had sent an email to the respondent on 19 July 2023 setting out full details of the losses which he said had been incurred by the applicant owing to the respondent's failure.
12. He set out the calculation of the rent differential of £120 per month plus the management fee that had been charged at the rate of £57.50 per month. This came to a total of £1420 over the period of eight months during which the tenancy had subsisted.
13. He stated that the roof repairs had eventually been completed at a total cost of £3228.56.

14. Additionally, the applicant had been unable to re-let the property for a period of time after the initial tenancy had ended. They had been unable to make arrangements for any builder to attend to carry out the repairs immediately in February. Work had eventually commenced in April and finished in May. A new tenant moved into the property in August 2023. Mr Impey indicated that he believed that four months' loss of rental (totalling £2780) was attributable to the respondent's failures.
15. The applicant calculated the total loss they had incurred owing to the respondent's failures at a figure of £7428.56 but had indicated in their email of 19 July to the respondent, that in an attempt to resolve matters, they would accept a total sum of £5700 in respect of the losses. This was the same figure that had been suggested at the CMD.
16. Mr Impey indicated that he received a response from the respondent on 16 August offering a settlement sum of £666.25. That was calculated by the respondent offering £360 in respect of rental loss. That calculation was based on offering three months of the rent differential of £120 per month. They were not willing to offer any more than that because in September 2022 a rent moratorium has been introduced by the government preventing any rent increases. They were offering a refund of 25% of the management fees (£86.25) and also offered to pay £220 which was the amount involved in the internal repairs to the property. Mr Impey responded to the email on 16 August indicating that this offer was not sufficient and that if the respondents did not wish to make any additional offer, he would simply allow the matter to proceed to the tribunal.
17. The respondents did not reply. On 16 September. Mr Impey contacted them again, asking if they had any amended offer to me. He received an email on 18 September from Aileen Merchant, the respondent's managing director, indicating that they were not willing to increase the offer and that they would also happily let matters proceed to the tribunal..
18. The tribunal asked Ms Low whether she was able to respond to the applicant's submissions and whether she was able to make any additional offer which might resolve the issue between the parties.
19. Ms Low indicated that she was not able to contradict the narration given by Mr Impey regarding the email "negotiations". She indicated that she did not have the authority to make any additional offer. That could only be done by the managing director, Ms Merchant who was apparently on leave.
20. The tribunal indicated to Ms Low that the present situation appeared to be the same as that which had occurred at the CMD. She was not in a position where she had authority to make any offer to settle the matter. That would be a matter only for the managing director. The tribunal discussed with Ms Low whether she wished to have a short adjournment to enable her to seek instructions on whether an increased offer was available to be made to try to resolve matters.

21. She indicated that she would wish to adjourn for that purpose and the tribunal agreed to journal for approximately 40 minutes to allow Ms Low to do so.
22. The tribunal reconvened after the adjournment. Ms Low indicated that she was now in a position to make an increased offer of £1026.25. That has been calculated by offering a refund of the full rent differential of eight months at £120 month plus the internal repairs of £220 plus the 25% of the management fee previously offered.
23. Mr Impey indicated that offer was not sufficient, and the applicant would not accept it. He repeated the position that the applicant was seeking the sum of £5700 as a global settlement covering the losses incurred.
24. The tribunal thereafter concluded the hearing, asked parties if they had any final comments to make. The tribunal thanked both representatives for their assistance and indicated that the tribunal would consider matters and issue a decision.

Findings in Fact

25. The applicant is the owner of the property.
26. The respondent is a registered letting agent and is bound to comply with the Letting Agent Code of Practice made under and in terms of section 46 of the Housing (Scotland) Act 2014 and which came into effect on 31 January 2018
27. The Code of Practice is contained in the schedule to the Letting Agent Code of Practice (Scotland) Regulations 2016 SSI 2016/133.
28. The applicant initially instructed Grant Fairbairn to act as their letting agent in connection with a granting of a tenancy of the property to new tenants, commencing in June 2022.
29. A monthly rental of £695 was agreed in respect of the tenancy.
30. The respondent acquired the business of Grant Fairbairn, prior to the creation and signature of a written tenancy agreement in respect of the tenancy.
31. The respondent thus became the applicant's letting agent.

32. The respondent created a written tenancy agreement dated 15 June 2023 with the new tenants at a monthly rental of £575 in respect of a tenancy which commenced on 15 June 2022. That rent was £120 less each month than the rent which had been agreed.
33. On 10 August 2022 the respondent sent an email to the applicant indicating they had received a report from the tenant reporting a damp patch appearing on the ceiling
34. The applicant authorised the respondent to take steps to repair the damp patch reported and to carry out any associated repairs to the external roof
35. The tenancy was terminated in February 2023.
36. At the date of termination of the tenancy. The respondents had not arranged any repair to be carried out to the leaking roof at the property.
37. The applicant organised and arranged repairs to the roof and internal ceiling after the tenancy had ended at a cost of £3328.56.

The alleged breaches of the Code of Conduct

38. The Code sets out the standards expected of letting agents operating in Scotland in how they manage their business and provide their services.
39. The applicant claimed that the respondent had breached the following parts of the code, namely paragraphs 7, 18, 20, 21, 26, 29, 62, 73, 74, 79, 86, 87, 89, 90, 91, 93, 94 and 108
40. The tribunal has concluded that the respondent has breached several parts of the Code and has failed in a number of the duties imposed by the code. The tribunal has also concluded that some of the claimed breaches have not been established or not actually engaged.
41. Paragraph 21 of the code requires a letting agent to carry out their services using reasonable skill and care and in a timely way.
42. Paragraph 26 requires a letting agent to respond to enquiries and complaints within reasonable timescales and in line with their written agreement.
43. Paragraph 73 indicates that if a letting agent has agreed with a landlord that they will fully manage the property on their behalf, they must provide their services in line with relevant legal obligations, the relevant tenancy agreement and relevant sections of code.
44. Paragraph 86 requires a letting agent to put in place appropriate written procedures and processes for tenants and landlords to notify them of any

repairs and maintenance required and to include timescales for carrying out routine and emergency repairs.

45. Paragraph 89 indicates that where a letting agent is notified by a tenant of any repairs requiring attention, they must manage the repair in line with the agreement with a landlord.
46. Paragraph 90 requires that repairs are dealt with promptly and appropriately, having regard to their nature and urgency.
47. Paragraph 91 requires a letting agent to inform a tenant of the action they intend to take on a repair and its likely timetable.
48. Paragraph 93 states that if there is any delay in carrying out repair and maintenance work then the letting agent must inform the landlord and tenant as appropriate about this delay, along with a reason for it as soon as possible
49. In each and every one of these duties, the respondents have signally failed. A repair was reported to them in August 2022. By the time the tenancy terminated in February 2023 the respondents had failed entirely to make any arrangements even to commence the repair work.
50. In the written submissions, and during the course of both the case management discussion and the hearing, no proper explanation was tendered for this failure. The suggestion made by the letting agent that they had contacted a number of contractors but they had not managed, in a period of almost six months, to find one in a city the size of Aberdeen who was available to carry out the work is simply an admission of complete failure to follow these parts of the code.
51. Further, the creation of the tenancy agreement with a rent which was £120 less every month than the amount agreed is a clear breach of section 21. Any letting agent acting with reasonable care and skill would not have created a tenancy agreement where the rent set out in the agreement was almost 20% short of the actual rent agreed between the landlord and tenant. This failure created a continuing and ongoing rental loss throughout the entirety of the tenancy.
52. This breach is compounded by the requirement in paragraph 62 of the code which indicates that if a letting agent prepares a tenancy agreement on the landlords behalf, it must ensure it meets all relevant legal requirements and include all relevant information, including the amount of rent. The agreement prepared in this case signally failed to include the correct agreed rent. Again, this is a clear failure to comply with this paragraph and another failure by the letting agent to comply with their obligations under the code.
53. Paragraph 108 of the Code requires letting agents to respond to enquiries and complaints within reasonable timescales. This paragraph applies to

complaints or enquiries from either landlords or tenants. In this case, there is a clear failure to respond to the request for a repair to be arranged. That request in respect of the outstanding repair can either be seen as an "enquiry" or a "complaint" from both landlord and tenant. Whichever aspect is accepted, the failure to organise a repair within six months is a clear failure to deal with either an enquiry or a complaint within a reasonable timescale.

54. Paragraph 17 requires letting agents to be honest, open, transparent and fair in your dealings with landlords and tenants (including prospective and former landlords and tenants).
55. Paragraph 18 requires letting agents to provide information in a clear and easily accessible way.
56. Paragraph 20 requires letting agents to must apply their policies and procedures consistently and reasonably.
57. With regard to these three paragraphs of the code, the tribunal is unable to find any actual failure by the respondent. There was simply no evidence which suggested they had breached these particular paragraphs.
58. The applicant claimed that there was a breach of paragraph 29 of the code. That paragraph indicates that in certain dealings with potential landlords, letting agents must provide clear information about their services, offer accurate and unbiased advice, inform a landlord of the need to become registered, identify any conflict of interest and take steps to check the identity of the landlord. The tribunal finds this paragraph is not breached nor indeed engaged in this application
59. The respondent claimed that there were failures by the respondent in respect of paragraphs 74 and 79 of the code. Paragraph 74 requires a letting agent, if they carry out routine visits and inspections, to record any issues identified and bring them to the landlord's attention. Paragraph 79 says that in managing any rentals, the letting agent must be able to demonstrate they have taken all reasonable step to recover any unpaid rent. The trial does not find any breach of these sections. There is no evidence that the letting agent carried out routine visits and inspections, and there was no evidence that any rent arrears existed.
60. Section 87 of the code requires a letting agent to have in place procedures for dealing with emergencies, where emergencies are part of the service. With regard to this particular paragraph, the tribunal have concluded that there is no breach. The repair reported was not an emergency. Certainly it was a repair that required attention on a reasonably urgent basis, but the tribunal would not categorise an initial report of a leak in a roof as being an emergency. The tribunal finds that this part of the code has not been breached.

61. The applicant also alleged a breach of paragraph 94 of the code. In terms of that paragraph, a letting agent must pursue a contractor or supplier to remedy any defects in any inadequate work. Given that the letting agent here did not instruct any work, there can be no breach for failing to pursue a contractor in respect of any defects. The tribunal finds this paragraph is not breached nor indeed engaged in this application .

Discussion and decision

62. Section 48 of the Housing (Scotland) Act 2014 is in the following terms

48 Applications to First-tier Tribunal to enforce code of practice

(1) A tenant, a landlord or the Scottish Ministers may apply to the First-tier Tribunal for a determination that a relevant letting agent has failed to comply with the Letting Agent Code of Practice.

(2) A relevant letting agent is—

(a) in relation to an application by a tenant, a letting agent appointed by the landlord to carry out letting agency work in relation to the house occupied (or to be occupied) by the tenant,

(b) in relation to an application by a landlord, a letting agent appointed by the landlord,

(c) in relation to an application by the Scottish Ministers, any letting agent.

(3) An application under subsection (1) must set out the applicant's reasons for considering that the letting agent has failed to comply with the code of practice.

(4) No application may be made unless the applicant has notified the letting agent of the breach of the code of practice in question.

(5) The Tribunal may reject an application if it is not satisfied that the letting agent has been given a reasonable time in which to rectify the breach.

(6) Subject to subsection (5), the Tribunal must decide on an application under subsection (1) whether the letting agent has complied with the code of practice.

(7) Where the Tribunal decides that the letting agent has failed to comply, it must by order (a “letting agent enforcement order”) require the letting agent to take such steps as the Tribunal considers necessary to rectify the failure.

(8) A letting agent enforcement order—

(a) must specify the period within which each step must be taken,

(b) may provide that the letting agent must pay to the applicant such compensation as the Tribunal considers appropriate for any loss suffered by the applicant as a result of the failure to comply.

(9) References in this section to—

(a) a tenant include—

(i) a person who has entered into an agreement to let a house, and

(ii) a former tenant,

(b) a landlord include a former landlord

63. The tribunal has clearly found that the respondent as failed to comply with the Code. The tribunal is therefore required in terms of section 48(7) to make a letting agent enforcement order (LAEO)

64. When making an order, the tribunal must specify the steps it considers are necessary to rectify the failure, and the tribunal may also provide that the letting agent must pay to the applicant such compensation as the tribunal considers appropriate for any loss suffered by the applicant as a result of the failure to comply.

65. In this case the respondent is no longer acting as a letting agent for the applicant. The tribunal accordingly does not require to specify any particular steps that the respondent needs to take to rectify the failure in respect of any ongoing service issues..

66. The tribunal does find that the respondent should make a payment to the applicant to compensate them for the loss suffered by them as a result of the respondent's failure to comply with the code.

67. The applicant have clearly set out the losses they say they incurred directly as a result of the respondent's failure.

68. The tribunal has no hesitation in accepting that the losses incurred in respect of the rental loss and the management fees during the period of tenancy, which amounted to £1420, should form part of any order. The rental loss was caused entirely by the respondent's failure. Given the respondent's complete failure to arrange a straightforward repair it seems reasonable that the management fees charged by them for the period of the tenancy should be refunded in their entirety. It is difficult to see what the respondent did which justified charging any fee given they failed to set up the tenancy agreement with the correct rent and then spent the remaining six months of the tenancy failing to arrange a repair which had

been reported to them by the tenant and which the landlord had almost instantly authorised them to instruct and effect.

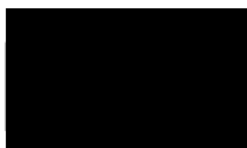
69. The tribunal also finds that additional compensation should be paid to the applicant in respect of the other losses suffered, including loss of rental after the termination of the tenancy created by the respondent.
70. The trial also finds that the applicant is entitled compensation in respect of at least part of the cost of the repairs eventually undertaken. The tribunal is unable to determine whether the repair eventually completed in March and April 2023, was significantly more expensive than the repair which could have been completed when it was first reported in August 2022.
71. However, the tribunal has carefully noted the applicant's submissions regarding the figure they would accept as appropriate compensation.
72. It is noted that the applicants have not sought any payment in respect to general inconvenience cause to them in respect of the respondent's failures to act in accordance with the code but have restricted their claim to amounts actually incurred or amounts which they believe have followed from the respondent's failures. They had calculated that total as being £7428.56 (as set out earlier in this decision) and indicated that they would happily accept a compromise figure of £5700.
73. The tribunal accepts the applicant's calculations as a reasonable estimate of the loss which they suffered owing to the respondent's failures. Without those failures, the applicant would not have suffered the rental loss of £120 per month. Without those failures, the required repairs to the property would have been completed significantly before they were eventually done. In that scenario, the applicant would have been able, on the balance of probabilities, to have had the property re-let prior to August 2023.
74. Further it seems reasonable to assume that a repair reported in August 2022 relating to a leaking roof of a property in Aberdeen would not have improved between that date and the termination of the tenancy in February 2023. Again, on the balance of probabilities, the tribunal is content to conclude that the condition of the roof worsened and thus the eventual costs of the required repair increased over that period.
75. The tribunal does not require to make an order which only reflect actual losses. It is entitled to make an letting agent enforcement order requiring payment of a sum which will compensate and applicant in respect of the failures of a letting agent to comply with the code.
76. In this case, the failures by the respondent are significant and extensive. They lasted throughout the entire period of the tenancy. The respondent failed in some of the most basic aspects of tenancy management. They made no attempt to resolve matters prior to the applicant raising tribunal

proceedings. Even when offered the opportunity to resolve matters during the tribunal process, they seemed to demonstrate no understanding nor acknowledgment of the extent of their failures and made offers which did not begin to reflect the seriousness of those failures.

77. The tribunal will therefore make a letting agent enforcement order which will require the respondent to pay the applicant the sum of £5,700 to reflect the breaches of the code and as compensation to the applicant in respect of the losses suffered by them caused by the respondent's failures to comply with the code.

Right of Appeal

In terms of Section 46 of the Tribunal (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission to appeal within 30 days of the date the decision was sent to them.



Legal Member/Chair

30 November 2023
Date